Lebbey Sdn Bhd v Tan Keng Hong & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2-12-203 OF 1999
FAIZA TAMBY CHIK J
7 OCTOBER 1999

Contract *— Damages — Liquidated damages — Damages for late delivery of vacant possession agreed to in sale and purchase agreement — Whether purchaser to show that loss actually incurred or suffered*

The applicant was a developer and had contracted to sell a factory lot to the respondent. The purchase price was paid but the applicant delayed in delivering vacant possession to the respondent by 324 days. The respondent sued for liquidated damages in accordance with the sale and purchase agreement ('SPA'). Summary judgment was entered against the applicant. The applicant appealed arguing, inter alia, that the respondents had failed to prove any losses due to the alleged breach of contract.

Held, dismissing the appeal:

(1) The applicant's averments that the respondent had not suffered or proved loss was irrelevant as since the parties agreed to liquidated damages, damages need not be proved (see p 525H–I).

(2) The applicant's construction of s 75 of the Contracts Act 1950 ('the Act') could not be accepted as it went against the principle that the parties were bound by the SPA (see p 527A–B).

(3) As the applicant had itself drawn up the SPA, it was estopped from relying on s 75 of the Act to avoid paying the agreed liquidated damages (see p 528D).

[Bahasa Malaysia summary

Pemohon adalah pemaju dan telah memasuki perjanjian untuk menjual sebuah kilang kepada responden. Harga belian telah dibayar tetapi pemohon melengahkan penghantar-serahan milikan kosong kepada responden selama 324 hari. Responden telah mendakwa untuk mendapatkan gantirugi jumlah tertentu menurut perjanjian jualbeli ('PJ'). Penghakiman terus telah dimasukkan terhadap pemohon. Pemohon merayu berhujah, inter alia, bahawa responden telah gagal untuk membuktikan sebarang kerugian disebabkan oleh kemungkiran PJ tersebut yang dikatakan.

Diputuskan, menolak rayuan tersebut:

(1) Penegasan pemohon bahawa responden tidak mengalami atau membuktikan kerugian adalah tidak relevan oleh kerana pihak-pihak tersebut bersetuju dengan gantirugi jumlah tertentu, maka gantirugi tidak perlu dibuktikan (lihat ms 525H–I).

(2) Pembentukan s 75 Akta Kontrak 1950 ('Akta tersebut') tidak boleh diterima kerana ianya adalah bertentangan dengan prinsip bahawa pihak-pihak tersebut terikat oleh PJ mereka (lihat ms 527A–B). A

(3) Oleh kerana pemohon telah dengan sendirinya menyediakan PJ tersebut, mereka telah diestop daripada bergantung pada s 75 Akta tersebut untuk mengelak daripada membayar gantirugi jumlah tertentu. (lihat ms 528D).] B

Notes

For cases on liquidated damages, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2492–2503. C

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd) D

Bumiputra Merchant Banker Bhd v The Melewar Corp Bhd & 2 Ors [1990] 2 CLJ 30 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Paramount Corp v Mulpha Pacific Sdn Bhd [1995] 5 CLJ 540 (refd)

Perdana Finance Bhd v Azmi Ahmad & Ors [1997] 2 CLJ 325 (refd) E

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)

Zainuddin Dato Seri Paduka Hj Marsal v Pengiran Putera Negara Pengiran Hj Umar bin Pengiran Datu Penghulu Pg Hj Apong & Anor [1998] 2 MLJ 1 (refd) F

Legislation referred to

Contracts Act 1950 s 75 G

Rules of the High Court 1980 O 18 rr 7(1), 8(1)

Subordinate Court Rules 1980 O 26A, r 4(1)

Appeal from: Summons No 1–52–7914–1997 (Sessions Court, Kuala Lumpur)

CJ Tam (*Rajinder Singh Veriah & Co*) for the applicant. H

Linda Lopez (*Su Tiang Joo* with her) (*De Costa & Co*) for the respondents.

Faiza Tamby Chik J: The appellant is a developer. The respondents were the joint purchasers of a factory known as Lot 117 in a project developed by the appellant called Pandan Indah Industrial Park ('the said factory'). The purchase price of RM288,000 has been fully paid. The appellant delayed in I the delivery of vacant possession of the said factory by 324 days. By this action, the respondents' claim against the appellant for liquidated and

ascertained damages ('LAD') as expressly contracted for in the sale and purchase agreement dated 14 September 1993 ('SPA') for such delay to the sum of RM30,677.92 plus interest and costs. The SPA was prepared by the appellant itself.

Chronology of Events.

A chronology of events pertaining to the action are as follows:

	Date	Particulars
1	14 September 1993	Sale and purchase pgreement ('SPA') between the appellant and respondents (see pp 16-49 appeal record ('AR')).
2	31 May 1995	The appellant was to deliver vacant possession of the said factory to the respondents (see the first schedule, para 8 at p 40 AR, cl 15 SPA at pp 29–30 AR).
3	19 April 1996	The appellant delivered vacant possession of the said property to the respondent (after a delay of 324 days).
4	7 May 1996	Letter from the appellant confirming that the respondents have complied with all the requirements of the SPA (see p 55 AR).
5	19 August 1997	Letter from the solicitors of respondents to the appellant demanding the LAD of RM30,677.92 (see pp 57–58 AR).
6	11 November 1997	Issuance of the summons and statement of claim. (see pp 1–9 AR).
7	6 January 1997	The respondents took out a notice of application under O 26A of the Subordinate Court Rules 1980 ('SCR') for summary judgment (see pp 10–11 AR).
8	3 March 1998	Mention in the sessions court. Hearing of respondents' application under O 26A of the SCR fixed for 29 May 1998.
9	22 May 1998	The appellant took out notice of aplication to strike out the respondens' suit.
10	29 May 1998	The appellant's solicitors orally applied to the sessions court for a postponement of the O 26A SCR application. The respondents' solicitors objected. The court granted the adjournment with costs of the day to respondents. Hearing of O 26A SCR postponed to 4 September 1998.
11	4 September 1998	Hearing of the appellant's application to strike out the suit with decision reserved to 21 September 1998.

12	21 September 1998	The sessions court ordered appellant's application to strike out the suit be dismissed with costs, which if costs cannot be agreed upon, the costs be taxed and fixed the respondents' application for summary judgment to 13 November 1998 for hearing.
13	30 September 1998	The appellant's notice of appeal (with regards to the decision of 21 September 1998).
14	13 November 1998	The appellant's solicitors made an oral application for stay of proceedings pending appeal. The respondents' solicitors objected and wanted the application for summary judgment to proceed. The sessions court judge gave two weeks mention date for the appellant to file in a formal application for stay of proceedings on 4 December 1998.
15	4 December 1998	The sessions court directed that the appellant's formal application for stay of proceedings be heard on 29 January 1999.
16	29 November 1999	Upon the appellant's request, the formal application for stay of proceedings was fixed on 15 March 1999.
17	11 February 1999	Upon the appellant's application to strike out the respondents' summons and statement of claim the court decided to dismiss the appellant's application with costs.
18	5 March 1999	The appellant withdrew its application for the stay of proceedings and the court fixed 5 May 1999 for the hearing of the respondents' application for summary judgment under O 26A of the SCR.
19	5 May 1999	The respondents' solicitors objected to the filing of additional affidavit by the appellant on 2 April 1999 (see pp 62–65 AR) and 28 April 1999 (see pp 97–85 AR) in relation to respondents' application for the summary judgment. The court postponed the hearing of the respondents' application for summary judgment under O 26A of the SCR to 14 July 1999, for the respondents to file their affidavit in reply to the appellant's affidavit of 28 April 1999.
20	14 July 1999	Hearing of the respondents' application for summary judgment under O 26A of the SCR at the sessions court wherein the sessions court ordered that summary judgment be entered in favour of the respondents with costs.
21	20 July 1999	The appellant filed its notice of appeal against the sessions court's decision of 14 July 1999.

22	10 August 1999	The appellant filed its record of appeal in respect of their appeal against the sessions court's decision of 14 July 1999.

The issues

Briefly, the appellant had raised and relied on three issues in the further affidavits dated 2 April 1999 and 28 April 1999 namely:

(i) that cl 16 of the SPA between the appellant and the respondents was to be interpreted in accordance with the law and more specifically with s 75 of the Contracts Act 1950 ('the Act') (see para 5 on pp 63–64 of the AR).

(ii) that the respondents had not suffered any loss/and or proved that they have incurred any loss due to the alleged breach of the SPA (see para 9 on p 64 of the AR.

(iii) that the respondents had only paid the full purchase price of the said property to the appellant after 18 days of the delivery of vacant possession, therefore the appellant were not obliged to deliver vacant possession within 24 months (see paras 9–10 on pp 81–82 of the AR).

Section 75 of the Act states:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, or if the contract contains any other stipulation by way of penalty; the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Based on the literal interpretation of s 75 of the Act and cl 16 of the SPA, the parties have agreed to liquidated damage if one party breaches the said SPA, whether or not actual damage or loss is proved to have been caused hereby, the complaining party will be entitled to reasonable damages not exceeding the amount agreed to by the parties as liquidated damages.

In *Bumiputra Merchant Banker Bhd v The Melewar Corp Bhd & Ors* [1990] 2 CLJ 30, the court held:

> [5] In relation to the imposition of interest at 2% per annum over the prescribed rate of default as being contrary to ss 74 and 75 of the Contracts Act 1950; since this additional interest at 2% per annum was an agreed term which was incorporated into the loan agreement, the defendants cannot now raise any objection to the imposition of such a rate and therefore, ss 74 and 75 of the Contracts Act do not apply.

Therefore based on the interpretation of s 75 of the Act, the appellant's averments that the respondents have not suffered loss and or proved loss as a consequence of the said breach is irrelevant since, if the parties have agreed to liquidated damages then damages need not be proven. The appellant submitted that according to O 26A r 4(1) of the SCR, the appellant may not less than four clear days before the date of hearing show

cause against an application (for summary judgment) by affidavit or otherwise to the satisfaction of the court and in this case the respondents' application for summary judgment ought to be dismissed as the respondents have failed to prove actual loss or damages consequent to the breach of contract.

It may be observed that the provisions/language and meaning of s 75 of the Act is clear in that if parties have agreed to liquidated damages if one party breaches the said SPA, whether or not actual damage or loss is proved to have been caused thereby, the complaining party will be entitled to reasonable damages not exceeding the amount agreed by the parties as liquidated damages. Therefore, the court should interpret this section by giving it a literal, plain and ordinary interpretation. A contrary interpretation would be against the express provisions of the section.

In *Zainuddin Dato Seri Paduka Hj Marsal v Pengiran Putera Negara Pengiran Hj Umar bin Pengiran Datu Penghulu Pg Hj Apong & Anor* [1998] 2 MLJ 1, the Court of Appeal of Brunei Darussalam held:

> [1] In the interpretation of statutes, the task of the court is to consider the whole of the legislative provisions in their proper context to ascertain the intention of the legislature as expressed by the wording employed. In doing so, effect has to be given to the common law prima facie rule that existing rights are not impaired unless such a construction is unavoidable. The court will apply the presumption that where some retrospective operation is intended, the statute is not to be construed so as to give it a wider retrospective operation than the language used makes necessary.
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> [2] If only one meaning can be given to the provisions under review, the court must disregard any apparent anomaly or seeming absurdity and construe the words used in their ordinary sense. But where this is not so, the court will seek to interpret the provisions in a way that does not result in absurdity.

I am of the opinion that to limit the application of s 75 of the Act to cases where damages are difficult to assess is illogical and cannot be accepted for the following reasons:

(a) The illustrations provided by s 75 of the Act, in particular illustration (a) clearly show that liquidated damages are permissible even when the actual damages suffered by the complaining party can be easily proved.

(See illustration (a) of s 75 of the Act).

Illustrations

(a) *A* contracts with *B* to pay *B* $1,000, if he fails to pay *B* $500 on a given day. *A* contracts with fails to pay *B* $500 on that day, *B* is entitled to recover from *A* contracts with such compensation, not exceeding $1,000, as the court considers reasonable.

(b) If the application of s 75 of the Act is limited to cases where damages are difficult to assess, then parties need not agree and enter into terms that provide for liquidated damages as they will not be bound with such a clause. On the contrary, the respondents submit that the

purpose of s 75 of the Act is to allow parties to enter into contracts that provide for liquidated damages so long as such terms are reasonable.

(c) The appellant's construction of s 75 of the Act cannot be accepted as it offends the principle that 'parties are bound by their agreement'.

In *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325 at p 326 the court held:

> [3] A court may distinguish an earlier decision when it finds that the case before it does not fall within the ratio decidendi of the earlier decision because of some material difference of fact. This apart, it can also distinguish an earlier decision by cutting down the ratio decidendi of that earlier decision. By the latter method the court cuts down the ratio decidendi of the earlier case by treating as material to the earlier decision some fact, present in the earlier case which the earlier court regarded as immaterial, or by introducing a qualification or an exception into the rule stated by the earlier court.

The facts in this case differ from *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, in that in *Selva Kumar* the clause pertaining to liquidated damages was unreasonable. In that case the said clause stated that in the event the purchaser defaults, all monies paid by the purchaser may be forfeited by the vendor. The purchaser had paid 80% of the purchase price to the vendor and subsequently defaulted. The vendor sought to forfeit all the monies paid by the purchaser. Therefore, surely the court in that case was minded to find that s 75 of the Act would not apply in the strict sense in that instance. However in this case, the agreed liquidated damages is 12% of the purchase price. It is submitted that this is reasonable in view of the fact that the appellant himself charges the respondents 12%pa of the purchase price on payments due (see cl 3 of the said SPA, p 21 of the AR).

Further, the respondents state that the terms of the said SPA were drawn up by the appellant itself. The appellant has also admitted that the parties (see para 8 on p 87 of the appeal record) agreed upon the said terms, therefore the appellant is bound and estopped from breaching the SPA.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court held:

> (2) The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.
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> (3) ...
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> (4) ...
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> (5) Even though estoppel was not pleaded as required under O 18 rr 7(1) and 8(1) of the Rules of the High Court 1980, the material facts giving rise to the estoppel were sufficiently pleaded without actually using the term

'estopped'. Furthermore, considerable evidence on the point was led at the trial by the respondent without objection from the appellant. A

(6) A court may permit a litigant to argue an unpleaded estoppel if it is in the interest of justice to do so. It is a matter within the discretion of the judge who must have due regard to all the circumstances of the case, including any prejudice that may be caused by the affected party being taken by surprise. Nevertheless, such departures should rarely be permitted, for otherwise, the rule that a party is bound by its pleadings will be rendered meaningless B

In *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, the Court of Appeal stated obiter dictum:

> Under the doctrine of estoppel, it would be unjust and inequitable to permit the appellants to raise the defence of limitation as the appellants had agreed that the respondents could enforce the guarantee 'at any time'. In regard to written law, the maxim can also be stated as 'equity will not permit statute to be use as an engine of fraud' to preclude the appellants who were guilty of unconscionable conduct from relying upon the Limitation Act 1953. C D

Therefore, I am of the view that because the terms of the said SPA were drawn up by the appellant itself, it cannot rely on s 75 of the Act to avoid paying the agreed 'liquidated damages'.

It is observed that the respondents' contention 'that the respondents had only paid the full purchase price of the said property to the appellant after 18 days of the delivery of vacant possession, therefore the appellant is not obliged to deliver vacant possession within 24 months', I am of the view that the appellant is estopped from relying on this averment based on the following: E

(a) the appellant voluntarily gave vacant possession to the respondents to facilitate the appellant to obtain loan from Perwira Affin Bank; F

(b) the letter dated 19 April 1999 from the appellant to the respondents (see pp 51–53 of the AR) states that the respondents will be deemed to have taken vacant possession seven days from the date of the said notice. Therefore the appellant is also bound by the effect of the said notice;

(c) the letter dated 7 May 1999 from the appellant to the respondents (see p 55 of the AR) states that the respondents have complied and fulfilled all the terms and obligations. Therefore the appellant is estopped from alleging that the respondents have taken vacant possession without fulfilling their obligations, because this would seem that the appellant is now contradicting the express contends of their letter. Therefore the appellant should not be allowed to make allegations to its whim and fancy; G H

(d) in addition to the above, I see that the respondents have also been charged interest for late payment, as shown in the statement of accounts (in the encl of the letter dated 19 April 1996) marked as exh 'L-2' in the respondents affidavit of 2 March 1998 (which the appellant has not included in their AR). This is the mode of payment agreed by the appellant and Perwira Affin Bank. The effect of the agreement is that the appellant has impliedly granted the respondents an extension of time to settle the balance price. Therefore the appellant is estopped from relying on the issue of late payment and to breach their obligation. I

A In *Paramount Corp v Mulpha Pacific Sdn Bhd* [1995] 5 CLJ 540 at p 541, the court held:

> [8] In fact and in law, the accrued Agreed Interest is not a penalty but is actually consideration for the plaintiff having so granted the additional time to the defendant.
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> Obiter:
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> [1] When an agreement has been reduced into writing, the parties are bound by the terms and conditions of the written document. They are bound by the four corners of the written document. The words and expressions used in a written document such as the S & P Agreement should be given their literal and natural interpretation.

C It is to be noted that the appellant itself charges interest at the rate of 12%pa on any unpaid sums (refer to cl 3 of the said SPA at p 21 of the AR). It does not now lie in the mouth of the appellant to complain that damages on late delivery of the factory should not be at 12%pa of the purchase price. In fact, if the appellant's argument was to be accepted, the appellant would have given the impression to members of the public that it should pay 12%pa on D the purchase price for every day of delay. Therefore, based on the above, the respondents believe that the appellans does not have a defence in this action and the facts of this case is undisputed and clear in that there is a valid sale and purchase agreement between the respondents and the appellant and that, inter alia, it is a term of the said SPA that the parties have agreed to E liquidated damages in the event of a breach. Hence, it is only reasonable and justifiable that summary judgment ought to be granted in favour of the respondents based on the said SPA.

In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, the Supreme Court held:

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> (2) Where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

G In the premise, I find that the appellant's appeal is not only inherently flawed but is totally devoid of merits, and I therefore dismiss it with costs.

Appeal dismissed.

Reported by Andrew Christopher Simon

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